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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL BENJAMIN RIVERA, Defendant and Appellant.	B235066 (Los Angeles County Super. Ct. No. KA085570)

APPEAL from a judgment of the Superior Court of Los Angeles County, Wade D. Olson, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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The trial court revoked appellant Michael Benjamin Rivera's probation because he had been arrested and held to answer for a new crime. We conclude any error was not prejudicial because two weeks after sentencing appellant pleaded no contest to the new crime, establishing its commission by his plea. Accordingly, we affirm the judgment.

PROCEDURAL HISTORY

Appellant was charged with two counts of grand theft perpetrated on two different victims. He pleaded no contest to one of the counts as part of a plea bargain.

The bargain required him to make restitution of $51,942.62 on the first count and $27,000 on the second count for a total of $78,942.62.[1] Sentencing was deferred pending payment of restitution[2] on the condition that if he failed to effect restitution, he would be sentenced to state prison for 16 months. Once restitution had been completed, appellant would be put on probation for three years. He was warned that if he violated probation, he could be sentenced to state prison for up to three years. Appellant expressly waived his right not to be sentenced to a term greater than that provided for in the plea bargain[3] in the event he failed to make an appearance or committed another crime.

The foregoing took place on October 6, 2009. Appellant regularly appeared thereafter in court from December 2009 to August 2010 and made restitution payments on each occasion.

Appellant initially failed to appear at the hearing set for October 15, 2010; defense counsel stated that appellant may have been taken into custody in another matter. Appellant's failure to appear was cured in due course. On October 21, 2010, the case was continued for sentencing to December 22, 2010, and appellant again waived his rights under Penal Code section 1192.5 (see fn. 3). Appellant continued to make restitution payments each time he appeared in court. On January 26, 2011, the court noted that the balance due on the restitution was $3,000.

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1 He agreed to make restitution on both counts even though he pled only to one.

2 Sentencing was continued at intervals of two months.

3 This right is protected by Penal Code section 1192.5.

Appellant failed to appear at the hearing set for March 30, 2011. The court found that there was an arrest warrant for appellant in another case, which is referred to hereafter as the "second case." The case was continued several times thereafter with no more restitution payments being made.

Appellant filed a motion to withdraw his plea on June 24, 2011. The motion was filed by newly substituted, privately retained counsel; appellant had been represented by retained counsel throughout.

The matter was heard on July 6, 2011. Defense counsel acknowledged appellant had been arrested in the second case and asked that appellant be sentenced to the low term of 16 months. The prosecutor stated without contradiction by the defense that appellant had been held to answer in the second case. The court, after stating there were "supposed to be no further violations of the law, no further problems,"[4] denied probation and sentenced appellant to the midterm of two years on the first count. The motion to withdraw the plea was of course also denied.

On July 20, 2011, appellant pleaded no contest on one count of the second case.

FACTS

Appellant worked as a loan officer and helped the victim to refinance his home. Appellant falsified some documents and managed to steal $51,942.62 from the victim.

DISCUSSION

Appellant contends that an arrest and the filing of a charge do not establish that he committed a crime. We agree. We need not, however, reach the more difficult questions of what proof and what type of hearing are required to prove commission of a new crime under these circumstances because appellant's subsequent no contest plea rendered any error harmless.

"Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it

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[4] The court went on to state: "It just so happens that he has a new case with three more charges with the same [*sic*]."

has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." (Pen. Code, § 1404.) Appellant pleaded no contest to one of the charges in the second case on July 20, 2011. Thus, as the record now stands, appellant did commit a crime in that a no contest plea is the equivalent of a plea of guilty for all purposes (4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Pretrial Proceedings, § 292, p. 561) and a plea of guilty admits every element of the offense. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242.) While between July 6, 2011, and July 20, 2011, the record did not reflect the commission of a new crime, after the latter date there is no question that appellant did commit another, new crime.

We note the absence of an objection during the hearing on July 6, 2011, to the court's decision to impose sentence because appellant had been arrested and held to answer on a new charge. Immediately after the court's statement we have quoted, defense counsel vigorously argued that appellant was fighting the new charges, but counsel did not object to the imposition of the sentence on the ground it had not been shown that a crime had been committed. We also note that appellant did not seek review of the imposition of sentence by way of an extraordinary writ, although it appears that for 14 days he could have done so. While it is unnecessary to take up the question of waiver, these omissions suggest that at the time of the July 6, 2011 hearing, appellant tacitly admitted the commission of a new crime. Nonetheless, it remains true that as of that date it could not be said he had committed a new crime.

We asked the parties to brief the question, among others, what effect should be given to the fact that appellant pled no contest in the second case. Appellant states that no effect should be given to this plea because "it may well have been entered solely because he was already sentenced in the instant case" and he was attempting by his new plea to receive concurrent sentencing. This is pure speculation and must therefore be rejected. Even if we were so inclined, and we are not, we would be without power to set aside the plea and judgment in the second case. The conviction in the second case is a fact of record, which we cannot simply ignore.

As far as the imposition of a two-year sentence is concerned, appellant clearly waived the right he had under Penal Code section 1192.5 to be sentenced to the term provided for in the plea agreement. He waived that right at least twice.

It is fundamental that for error to be reversible, it must be prejudicial. (Pen. Code, § 1404; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Not only is there no prejudice, it cannot be said that there is, at this point in time, error. Appellant's plea on July 20, 2011, cured the error that had been planted on July 6, 2011. Error may be cured in a variety of ways (see generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 436 et seq.) and while this may not have been one of the traditional ways to cure error, the plea on July 20, 2011, nonetheless did cure any error in that we must take the record as we find it.

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

RUBIN, Acting P. J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.